Supreme Court of the United States

OCTOBER TERM, 1968

No. 366

UNITED STATES OF AMERICA, *Appellant*,

—v.—

HENRY PRESTON COVINGTON, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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DOCKET ENTRIES IN DISTRICT COURT

DATE		PROCEEDINGS
11-29-67	(1)	Indictment filed
12-14-67		Plea of not guilty entered as to the one count, bond continued. (electronic recording of arraignment filed, see envelope no. 11)
1-10-68	(2)	Reporter's transcript of arraignment filed.
3-11-68	(3)	Defendant's motion to dismiss the indictment and memorandum in support filed.
3-13-68	(4)	Praecipe filed by the U.S. Attorney, 3 subpoenas issued to the U.S. Marshal.
3-15-68	(5)	Memorandum of the U.S. contra the motion to dismiss indictment filed.
3-26-68	(6)	Returns of the U.S. Marshal on the subpoenas issued 3-13-68 for Gilbert Weaver and Sgt. John Kaiser filed.
3-27-68	(7)	Opinion and Order filed, the motion of the Defendant to dismiss the indictment is granted. Copies delivered to the U.S. Attorney and mailed to Mr. Davis.
3-28-68	(8)	Return of the U.S. Marshal on the subpoena issued 3-13-68 for Stanley G. Hall filed.
4- 3-68	(9)	Motion by U.S. Attorney for reconsideration of the order dismissing the indictment and memorandum in support filed.
4- 3-68	(10)	Amended motion by the U.S. Attorney for reconsideration of the order dismissing the indictment and memorandum in support filed.
4-10-68	(11)	Memorandum of the U.S. in support of the petition for reconsideration filed.

DATE		PROCEEDINGS
5- 6-68	(12)	Order filed, Defendant's motion was properly granted and the dismissal of the indictment shall stand as the order of the Court. Copies delivered to the U.S. Attorney and mailed to Mr. Davis.
6- 4-68	(13)	Notice of appeal to the Supreme Court of the United States filed. Copy mailed to Mr. Davis.
6-27-68		Record certified to the Clerk of the Supreme Court of the United States.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

26 U.S.C. 4744(a)(1)

UNITED STATES OF AMERICA

vs.

HENRY PRESTON COVINGTON

THE GRAND JURY CHARGES:

COUNT I

That on or about August 11, 1967, within the Eastern Division of the Southern District of Ohio, HENRY PRESTON COVINGTON, being a transferee of marihuana required to pay the tax imposed by Title 26, United States Code, Section 4741(a), did acquire and obtain approximately 737.1 grams of marihuana without having paid such tax. In violation of 26 U.S.C. 4744(a)(1).

ROBERT M. DRAPER
United States Attorney

/s/ Robert A. Bell
Assistant United States Attorney

IN THE
UNITED STATES DISTRICT COURT OF OHIO
SOUTHERN DISTRICT
Eastern Division
[Title Omitted]

MOTION TO DISMISS

Now comes the defendant Henry Preston Covington, through his Attorney, and moves the Court, that the indictment against him under 26 U.S.C. 4744 (a) (1), be dismissed by reason of the fact that said law requires the defendant to incriminate himself contrary to the Fifth Amendment to the United States Constitution.

WILLIAM J. DAVIS
Attorney for Defendant

MEMORANDUM IN SUPPORT OF MOTION

The defendant bases his motion on a series of cases reported in Vol. 19 L ed 2d, February 26, 1968. The citations will therefore be from the Lawyers' Edition, because of the recent publication of the cases. The cases in question are *Marchetti* v *United States*, 19 L ed 2d 889, *Grosso* v *United States*, 19 L ed 2d 906 and *Haynes* v *United States*, 19 L ed 2d 923. A careful reading of these cases indicates that they specifically overrule *United States* v *Kahriger* 97 L ed 754 and *Lewis* v *United States* 99 L ed 475 and as aptly stated by Chief Justice Warren in his dissent to *Grosso* v *U. S.*, these cases open the door for "a new wave of attacks on a number of Federal registration statutes wherever the registration requirement touches upon allegedly illegal activities", See *Grosso* v *U. S.* 19 L ed at Pg. 921. It is interesting to note that it was the opinion of the Chief Justice in his dissent that these three cases also affected the requirements for registration as to dealers in marihuana.

The defendant in the present case is charged with being the transferee of marihuana and with failing to pay the tax required by Title 26 U.S.C. Sec. 4741 (a), said failure being a violation of 26 U.S.C. 4744 (a) (1). It follows from a careful reading of *Haynes* v *U. S.*, *Grosso* v *U. S.*

and *Marchetti v. U. S.* that the particular tax scheme on which the defendant faces the Court bears a substantial and close relation to the schemes involved in these three cases and especially in the Haynes case, since in the present case the defendant would be required to register as the transferee of contraband goods, to wit marihuana, which is a contraband punishable for possession both under the laws of the State of Ohio. The nature of the information required by the statute is evidenced by the Notice and Demand served on the defendant by Narcotic Agent Jack L. Lloyd dated August 11, 1967, which would require the defendant to produce a copy of an official order form as required under Section 4742 of Internal Revenue Code indicating the transfer of marihuana. Since marihuana is contraband goods and is punishable in its possession both under the United States Code and under the statute of the State of Ohio, the information requested, the registration requested and the whole tax scheme is incriminatory, and we can only assume that here is a clear Governmental scheme to gather evidence from citizens in order to secure their conviction of crimes. This contravenes the privilege of the Fifth Amendment to the United States Constitution. See Albertson v S.A.C.B. 15 L ed 2d 165.

Since the tax scheme invisioned by 26 U.S.C. 4741 (a) as applied to the defendant under this indictment with reference to violation of 26 U.S.C. 4744 (a) (1) involves a compulsory legal scheme requiring the defendant to admit that he is indulging in illegal activities which violate the laws of the United States and the laws of the State of Ohio (See Ohio Revised Code 3719.09), it is the contention of the defendant that said law is in violation of his privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. It follows that under the recent case law enunciated by the Supreme Court (Marchetti, Grosso and Haynes) the indictment against the defendant should be dismissed, and the defendant respectfully requests that the Court dismiss said indictment.

Attorney for Defendant
WILLIAM J. DAVIS

[Certificate of Service Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

OPINION AND ORDER

Defendant is charged by indictment with being a transferee of and acquiring a quantity of marihuana without having paid the tax imposed by law, in violation of Title 26, United States Code, Section 4744(a)(1).

Following his plea of not guilty upon arraignment, defendant filed a motion to dismiss the indictment. In its consideration of this motion, the Court has had the assistance of the supporting and contra memoranda.

Title 26, United States Code, Section 4741(a) provides:

> (a) Rate.—There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:
>
> (1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.
>
> (2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof. . . .

Section 4742, which forms the basis for determining taxable transfers, provides:

> (a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special

tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions.—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) Professional practice.—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) Prescriptions.—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: Provided, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: Provided further, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) Exportation.—To the sale, exportation, [illegible] ment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any

foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials.—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) Certain seeds.—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753. . . .

Failure to pay the tax imposed is a violation of Title 26, United States Code, Section 4744 (a) (1):

(a) Persons in general.—It shall be unlawful for any person who is a tranferee required to pay the transfer tax imposed by section 4741 (a)—

(1) To acquire or otherwise obtain any marihuana without having paid such tax. . . .

The basis of defendant's motion is the allegation that the foregoing statutory scheme is, at least as to him, violative of the Fifth Amendment to the United States Constitution in that it requires a person to incriminate himself.

What has evidently prompted this motion is a group of decisions recently entered by the United States Supreme Court. *Marchetti* v. *United States*, 36 U.S.L. Week 4143 (Jan. 29, 1968); *Grosso* v. *United States*, 36 U.S.L. Week 4150 (Jan. 29, 1968); *Haynes* v. *United States*, 36 U.S.L. Week 4164 (Jan. 29, 1968). In those cases it was determined that criminal prosecutions under the statutes imposing the annual occupational tax on gamblers,[1] the require-

[1] Title 26, United States Code, Section 4411; *Marchetti*.

ment to register before engaging in the business of accepting wagers,[2] the excise tax on wagering,[3] and a criminal penalty on possessors of "unregistered firearms"[4] were each subject to an absolute defense in the form of an assertion that the statute was unconstitutional inasmuch as each one had the effect of compelling the respective defendants, and others similarly situated, to incriminate themselves. The questioned statutes required disclosure of past, present or prospective activities in areas "permeated with criminal statutes." *Marchetti, supra.* Compliance with any of the statutory requirements were directed at persons inherently suspect of criminal activities and created real, appreciable and substantial hazards of self-incrimination. *Ibid.* The hazards were particularly emphasized by the further statutory requirement that a list of all such taxpayers be made available for public inspection. Title 26, United States Code, Section 6107.[5]

A reading of the statutory tax scheme presently in question discloses that it, like those previously declared "unconstitutional," raises more than merely imaginary hazards of self-incrimination. The hazards here are likewise real, appreciable and substantial, and the statutory requirements, with the many exclusions, are primarily directed at those who are inherently suspect of criminal activities.[6] Again,

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[2] Title 26, United States Code, Section 4412; *Marchetti.*

[3] Title 26, United States Code, Section 4401; *Grosso.*

[4] Title 26, United States Code, Section 5851; *Haynes.*

[5] That section provides that:

> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

[6] In Ohio, criminal penalties are provided for persons who are subject to the taxing provisions herein questioned. Ohio Rev. Code,

as was the case of persons who complied with the statutes challenged in *Marchetti*, *Grosso*, and *Haynes*, those who pay the tax imposed by § 4741(a) are subject to having their names published in a list made available to interested prosecuting authorities by virtue of § 6107.[7]

As in the recent Supreme Court trilogy, this Court must also consider the relevance of the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1 (1948). The same elements which served to distinguish the situations

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§§ 3719.01 - 3719.36, 3719.99 (1953). Similar statutes prevail in other jurisdictions. See, e.g., Ala. Code, Tit. 22, §§ 256 - 258 (1958); Alaska Stat. §§ 17.10.010 - 17.10.240 (1962); Ariz. Rev. Stat. §§ 36-1001 - 36-1024 (1956); Ark. Stat. §§ 82-1001 - 82-1024 (1947); Cal. Health and Safety Code, §§ 11001 - 11853 (1964); Colo. Rev. Stat. §§ 48-6-1 - 48-6-22 (1953); Conn. Gen Stat. §§ 19-244 - 19-268 (1958); Del. Code Ann., Tit. 16, §§ 4701 - 4722 (1967); Fla. Stat. Ann. §§ 398.01 - 398.23 (1963); Ga. Code Ann. §§ 42-801 - 42-822, 42-9917 - 42-9919 (1957); Hawaii Rev. Laws §§ 52-10 - 52-39 (1955); Idaho Code §§ 37-2301 - 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 - 22-49 (1964); Ind. Stat. Ann. §§ 10-3519 - 10-3550 (1956); Iowa Code Ann. §§ 204.1 - 204.25 (1946); Kan. Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev. Stat. §§ 218.010 - 218.240 (1962); La. Stat. Ann. 40:961 - 40:984 (1951); Me. Rev. Stat. Ann., Tit. 22, §§ 2361 - 2380 (1964); Md. Ann. Code, Art. 27, §§ 276 - 306 (1957); Mass. Ann. Laws, c. 94 §§ 197 - 217D (1957); Mich. Comp. Laws Ann. §§ 335.51 - 335.77 (1961); Minn. Stat. Ann. §§ 618.01 - 618.25 (1963); Miss. Code Ann., Tit. 25, c. 2 (1942); Mo. Rev. Stat. Ann., c. 195 (1959); Mont. Rev. Codes Ann. §§ 54-101 - 54-128 (1947); Neb. Rev. Stat. §§ 28-451 - 28-472.01 (1943); Nev. Rev. Stat. § 453.010 (1963); N.H. Rev. Stat. Ann., c. 318-A, §§ 1 - 26 (1964); N.J. Rev. Stat. Ann., Tit. 24, c. 18 (1940); N.M. Stat. §§ 54-7-1 - 54-7-51 (1953); N.Y. Pub. Health Law, Art. 33 (1953); N.C. Gen. Stat., c. 90, Art. 5 (1958); N.D. Cent. Code Ann. §§ 19-03-01 - 19-03-32 (1960); Okla. Stat. Ann., Tit. 63, §§ 466 - 469A (1963); Ore. Rev. Stat., Tit. 37, c. 474 (1967); Pa. Stat. Ann., Tit. 35, §§ 780-1 - 780-31 (1964); R.I. Gen. Laws Ann. §§ 21-28-1 - 21-28-66 (1956); S.C. Code Ann. §§ 32-1461 - 32-1495 (1962); S.D. Code, Tit. 22, §§ 1301 - 1324 (1939); Tenn. Code Ann. §§ 52-1301 - 52-1323 (1966); Tex. Pen. Code Ann., Art. 725b (1961); Utah Code Ann. §§ 58-13a-48 (1953); Vt. Stat. Ann., Tit. 18, §§ 4141 - 4163 (1959); Va. Code Ann., Tit. 54, §§ 487 - 519 (1950); Wash. Rev. Code §§ 69.33.220 - 69.33.960 (1959); W.Va. Code Ann. §§ 16-8A-1 - 16-8A-26 (1961); Wis. Stat. Ann. §§ 161.275 (1957); Wyo. Stat. Ann., Tit. 35, §§ 348 - 371 (1957).

[7] See, *United States* v. *Sanchez*, 340 U.S. 42 (1950), as to the obviousness of the Congressional intent to aid in the regulation of the illicit traffic in marihuana.

of those cases from that of *Shapiro* are present in the instant matter. Stated otherwise, defendant was "required simply to provide information, unrelated to any records which he may have maintained," there were no "public aspects" to the information sought, and the requirements here are directed to a "selective group inherently suspect of criminal activities." *Marchetti; Albertson* v. *SACB*, 382 U.S. 70, 79 (1965); *Shapiro*. Similarly distinguishable is *United States* v. *Sullivan*, 274 U.S. 259 (1927).

Finally, as in *Marchetti*, *Grosso*, and *Haynes*, this Court does not feel it within its province to engraft immunity restrictions [8] on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities. § 6107. See also, *United States* v. *Sanchez*, 340 U.S. 42 (1950). It is for the legislature, rather than the judiciary, to make new law; the judiciary can only say whether a statutory enactment of legislative intent, or its enforcement, in a particular instance, is constitutionally permissible.

WHEREFORE, the Court determines that the defendant has properly asserted the constitutional privilege against self-incrimination as a total defense to prosecution in this case. However, the Court also feels compelled to add that nothing determined herein serves as a holding that the marihuana tax provisions are unconstitutional or that the states may not continue to enforce their statutes prohibiting the sale, possession, etc., of marihuana. As to the application of the federal tax provisions, their enforcement through penalties may continue against persons not confronted by real, appreciable or substantial hazards of self-incrimination, or persons who are otherwise outside of the privilege's protection.

The motion to dismiss the indictment is GRANTED.

/s/ Joseph P. Kinneary
United States District Judge

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[8] See *Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52 (1964), as an example of immunity restrictions imposed within the province of the judiciary.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

[Title Omitted]

MOTION FOR RECONSIDERATION

Now comes the United States Attorney on behalf of the United States of America and requests the Court to reconsider its order dismissing this case.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

MEMORANDUM

It has come to the attention of the U. S. Attorney that a similar case was decided on February 7, 1968, in the Southern District of New York by Judge Motley and that the constitutionality of the code sections relating to the marihuana tax were upheld.

At this time a memorandum is being prepared relative to the constitutionality of the tax and will be submitted to the Court on or before April 10, 1968. The memorandum will also cite regulations which prohibit those illegally engaged with marihuana from obtaining the order forms and, thus, overcoming any self-incrimination argument. Therefore, due to the significant effect of this case and in the national interest, it is requested that the motion to dismiss be reconsidered in light of the memorandum to be submitted within the next seven days.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

[Certificate of Service Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

[Title Omitted]

AMENDED MOTION FOR RECONSIDERATION

Now comes the United States Attorney on behalf of the United States of America and requests the Court to reconsider its order dismissing this case.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

MEMORANDUM

At this time a memorandum is being prepared relative to the constitutionality of the tax and will be submitted to the Court on or before April 10, 1968. The memorandum will cite regulations which prohibit those illegally engaged with marihuana from obtaining the order forms and, thus, overcoming any self-incrimination argument. Therefore, due to the significant effect of this case and in the national interest, it is requested that the motion to dismiss be reconsidered in light of the memorandum to be submitted within the next seven days.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

[Title Omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION

This memorandum is intended to bring to the attention of the Court certain matters which were not fully set forth in the Government's response to defendant's motion to dismiss. It is the Government's view that the points discussed herein are dispositive of the issue of the constitutionality of the statute under which the defendant was charged and that reconsideration of the Court's original opinion and order is therefore justified.

In brief, the Government contends that, as a result of regulations issued by the Commissioner of the Bureau of Narcotics, only persons entitled under state law to use marihuana can register under Section 4753 of Title 26 and secure an order form under Section 4742. Thus, a transferee who pays the transfer tax imposed by Section 4741 and provides the transferor with the required order form has complied with federal law and can in no way incriminate himself under state law. Those who are not qualified to register and obtain order forms are, in essence, prohibited from dealing in marihuana.

I. *Objectives of the Marihuana Taxing Act*

The Marihuana Taxing Act, 50 Stat. 551 (1937), now 26 U.S.C. 4741, et seq., was originally enacted to achieve two objectives: first, to develop a source of revenue, and second, to limit the illicit use and punish the illegal transfer of the drug. See S. Rep. No. 900, H.R. Rep. No. 792, 75th Cong., 1st Sess. (1937). The Senate report summarizes the methods to be used to accomplish the purposes of the bill as follows (p. 3):

> Thus, the bill is designed, through the occupational tax and the order-form procedure, to publicize *legitimate* dealings in marihuana and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses. (Emphasis supplied.)

In drafting what are now Sections 4741 and 4744, however, Congress acted, perforce, on the basis of the extent to

which marihuana was regulated in 1937, and it is the purpose of this memorandum to show that, as the states developed more encompassing legislation and as the medical use of the drug dwindled, it was necessary for the Commissioner of Narcotics to place an administrative interpretation on the statute which would bring the congressional purpose into line with the modern realities of marihuana control.[1] That interpretation is embodied in the regulations (attached to this memorandum) issued jointly by the Commissioner of Narcotics and the Commissioner of Internal Revenue, and its effect is to eliminate any possibility that one dealing in marihuana will be forced to divulge incriminating information or risk being subjected to criminal sanctions for failing to make such a divulgence.

As the defendant points out in his memorandum in support of the motion to dismiss, the payment of the transfer tax imposed by Section 4741(a) and the requirement that the tranferee secure an order form under Section 4742(a) are inextricably intertwined. Although the defendant is charged with being a transferee without having paid the transfer tax, any claim that he has been forced to incriminate himself must call for an examination of the order form provisions, for the stamps which represent payment of the tax are to be affixed to the form (Section 4743), and his failure to produce the form on demand of the Secretary's delegate is presumptive evidence of his violation of Section 4744. It is, then, crucial to determine exactly what function Congress intended this statutory scheme to perform, and to that end the following statement of the Honorable Frank H. Buck, one of the sponsors of the act, is pertinent:

> It is further *made illegal to transfer marihuana except in pursuance of a written order* from the trans-

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[1] Section 7805(a) of Title 26, United States Code, reads in part:

> . . . The Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue. .

The use of the regulatory power for the purposes involved here is clearly proper. *United States* v. *Fisher*, 353 F.2d 396, 398 (5th Cir. 1965); Sutherland, *Statutory Construction*, Ch. 40, §§ 4002, 4003 (3rd Ed.)

feree on a form to be issued by the Secretary of the Treasury, and upon all such transfers is levied a tax at the rate of $1 per ounce, or fraction thereof, on transfers to persons registered under the act, and at the rate of $100 per ounce, or fraction thereof, on transfers to persons not registered under the act. *It is made illegal for a transferee to acquire marihuana without payment of the transfer tax.* (Emphasis supplied.) 81 Cong. Rec. 1440, 1441 (1937)

It is clear from this excerpt that Congress contemplated that there could be legal transfers to persons who were not registered under Section 4753, and that conclusion is borne out by the language of Section 4741 ("there shall be imposed upon all transfers . . . to any person who has not paid the special tax") and Section 4742 ("it shall be unlawful for any persons, whether or not required to pay a special tax and register"). Although even in 1937 there would not have been many occasions on which such a transfer would have been possible, the failure of some states to enact the type of complete regulatory legislation which is now present in all fifty would have made it possible for an individual who was not a dealer to make a single purchase of marihuana if he was willing to pay the $100 tax designed to discourage just such potentially dangerous transactions.[2] There is no doubt that such a person could have forced the district director to provide him with an order form so that he could pay the tax and thus comply with the federal law, and it was therefore necessary to make some statutory provision for him.

Thirty-one years after the enactment of the Marihuana Taxing Act circumstances have changed markedly. Today all states have the type of comprehensive legislation which, with certain narrow exceptions modeled on those contained in Section 4742, forbids the transfer of marihuana. The small group of unregistered persons who had the right to obtain an order form in 1937 has disappeared, and, in essence, there can now be no collection of the $100 tax

[2] In 1937 only thirty-nine states and the District of Columbia had adopted the Uniform Narcotic Drug Act, and the report of the Bureau of Narcotics on the *Traffic in Opium and Other Dangerous Drugs* (1938) states that seven states had passed neither the Uniform Act nor other adequate narcotic legislation.

before the transfer occurs.[3] To say that the district director must issue an order form to anyone requesting it is to say that he must, in some sense, aid in the commission of offenses under state law, and to protect the federal government from being placed in that position the regulations provide (26 C.F.R. § 152.23):

> The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

Further, the regulations deny order forms to anyone who is not registered,[4] and thus the applicant who fails to show that he would not be in violation of state law is barred from providing any of the self-incriminatory information which the defendant asserts he is being punished for failing to furnish.

The conclusion to be drawn is essentially very simple: prepayment of the transfer tax at the rate of $1 per ounce under Section 4741(b) is enforceable as to all legal transfers of marihuana; prepayment of the $100-per-ounce tax is now impossible, and so, as regards transfers to unregistered persons, Section 4744 now constitutes an absolute prohibition. This result comports fully with the congressional intent to publicize legitimate transactions in marihuana and to keep the drug out of the hands of those who would put it to unlawful use, and, in addition, it obviates totally any potential constitutional infirmity.

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[3] Of course, the Government is not foreclosed from collecting the $100 tax *after* it has been established that a transfer was made to an unregistered person.

[4] Although there is no specific provision which limits the dispensing of order forms, the stated result must follow from a reading of § 152.67 and § 152.68, which require the signing of applications by the same person who signed the registration and the comparison of the two signatures by the district director before the order form may issue. It is important to note, too, that improper applications for order forms (including those which indicate that the applicant would not be operating legally under state law) are not made available to law enforcement agencies as are proper registrations under the provisions of 26 U.S.C. 4775 and 6107.

II. *Analogous Provisions of the Narcotics Statutes*

An instructive comparison can be made between the statutory provisions regulating the transfer of marihuana and those regulating the transfer of narcotic drugs. In the case of narcotics, the statutory provisions themselves specify that only those lawfully importing, selling or dealing in narcotics are subject to the occupational tax under 26 U.S.C. 4721 and are required to register under 26 U.S.C. 4722. See, *United States* v. *Jin Fuey Moy*, 241 U.S. 394. Order forms can be obtained by an individual only for "the use, sale, or distribution by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." 26 U.S.C. 4705(g). This order form provision creates, in effect, "a kind of registration of lawful purchasers, in addition to one of lawful sellers. . ." *Nigro* v. *United States*, 276 U.S. 332, 345 (1928).

In short, by requiring these registries of lawful sellers and purchasers of narcotics, the Congress has sought to prevent unauthorized persons from obtaining drugs and selling them clandestinely without paying the taxes imposed by federal law. The identification of those who are lawful dealers in narcotics facilitates the detection of those who are unlawful dealers and renders their transactions more difficult, thus enabling the United States to maximize the tax revenues to which it is entitled. *Nigro, supra; United States* v. *Hymowitz*, 196 F.2d 819 (1952); *United States* v. *Wong Sing*, 260 U.S. 18 (1922); *United States* v. *Doremus*, 249 U.S. 86 (1919). Persons dealing in contraband drugs are not subject to prosecution for failure to comply with the registration provisions and are punishable only under Section 4704 (prohibiting sales other than from the original stamped package) or Section 4705 (requiring that all transfers be pursuant to a written order). In neither case is a Fifth Amendment problem presented.

III. *Conclusion*

The basic objection to the statutory schemes involved in *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968), was that they faced the defendant with an insoluble dilemma; he could come forward

and admit his past participation or future involvement in criminal activity or he could refuse to come forward and thus open himself up to prosecution for failure to register as required. The Supreme Court was unwilling to permit the government to enact interlocking registration and penal statutes which compelled incriminatory admissions on the one hand and punished unwillingness to confess on the other, but one who plans to be a transferee of marihuana must choose between two totally different and entirely permissible alternatives: either he must qualify under state law as a transferee and then register those qualifications or he must refrain from dealing in the drug altogether. Since no registration is permitted unless the applicant could legally acquire marihuana and since order forms are issued only to registrants, self-incrimination is impossible.

The Government therefore submits that Section 4744(a) of Title 26 is entirely constitutional and that the opinion and order of this Court dated March 27, 1968, should be recalled and the motion to dismiss the indictment denied.

[Note: It has come to the attention of the Government that the full bench of the Court of Appeals for the Fifth Circuit reconsidered the panel's opinion in *Leary* v. *United States*, decided September 29, 1967, in light of the Supreme Court's decisions in *Marchetti*, *Grosso* and *Haynes* and, on March 29, 1968, affirmed the conviction, holding that those cases do not affect the validity of either 21 U.S.C. 176a or 26 U.S.C. 4744.]

Respectfully submitted,

ROBERT M. DRAPER
United States Attorney

Of Counsel:

PHILIP WILENS
CHARLES RUFF
ROBERT LODEWICK
Attorneys, Department of Justice

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

ORDER

This matter is before the Court on the motion of the United States for reconsideration of the Court's order of March 27, 1968, dismissing the indictment.

The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.

If defendant had no obligation to pay the tax and obtain an order form, the United State had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741(a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

WHEREUPON, the Court determines that defendant's motion was properly granted, and the dismissal of the indictment shall stand as the Order of the Court.

/s/ Joseph P. Kinneary
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

[Title Omitted]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the Supreme Court of the United States from the Order dismissing the indictment on reconsideration entered in this proceeding on the 6th day of May, 1968. This appeal is taken pursuant to Title 18, United States Code, Section 3731.

Dated: June 4, 1968.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
CHARLES R. DERSOM
Assistant United States Attorney
Attorneys for the United
States of America

[Certificate of Service Omitted]

SUPREME COURT OF THE UNITED STATES

No. 366, October Term, 1968

UNITED STATES, APPELLANT

v.

HENRY PRESTON COVINGTON

APPEAL from the United States District Court for the Southern District of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 65.

October 21, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PRESTON COVINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court dated March 27, 1968, dismissing the indictment (App. A. 11-18, *infra*) is reported at 282 F. Supp. 886. The opinion dated May 6, 1968, denying reconsideration (App. B. 19-20, *infra*), is not reported.

JURISDICTION

The order of the district court, dismissing the indictment on the ground that prosecution under the

statute (26 U.S.C. 4744 (a) (1)) would either violate the privilege against self-incrimination or fall outside the terms of the statute, was entered on May 6, 1968. Notice of appeal to this Court was filed on June 4, 1968. The original decision of the district court sustained appellee's plea that the prosecution was barred by his privilege against self-incrimination (App. A. 18, *infra*). On the government's motion for reconsideration, the district court held alternatively (App. B. 19, *infra*) that the statute did not authorize the indictment in this case. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes the government to take a direct appeal from a decision sustaining a plea in bar, see *United States* v. *Blue*, 384 U.S. 251, 253-254, as well as from a dismissal of an indictment where the decision is based upon the construction of the statute on which the indictment is founded, see *United States* v. *Fabrizio*, 385 U.S. 263, 266.

QUESTIONS PRESENTED

1. Whether the provision of the Marihuana Tax Act (26 U.S.C. 4744(a)(1)) prohibiting the acquisition of marihuana by one who has not paid the tax imposed by 26 U.S.C. 4741(a)(2) impinges upon the privilege against self-incrimination when the statute is construed and applied as not permitting pre-payment of the tax by those whose handling of marihuana would violate state law.

2. Whether Congress has authorized prosecution under 26 U.S.C. 4744(a)(1)—punishing the acquisition of marihuana by one who has failed to pay the

tax imposed by 26 U.S.C. 4741(a)(2)—when the defendant could not have pre-paid the transfer tax because not lawfully entitled to register as a marihuana handler.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations (26 U.S.C. 4741, 4742, 4744, 4751, 4753; 26 C.F.R. 152.22, 152.23, 152.66-152.68) are set forth in Appendix C, *infra*, 21-27.

STATEMENT

Appellee was charged in a one count indictment with violating 26 U.S.C. 4744(a)(1) by obtaining 737.1 grams of marihuana without having paid the transfer tax imposed by 26 U.S.C. 4741(a).[1] On appellee's motion, the trial court dismissed the indictment on the ground that under the principles ex-

[1] Section 4741(a) imposes transfer taxes at two rates. Subparagraph (a)(1) imposes a $1 per ounce tax on all marihuana transfers to persons who are registered under the terms of Sections 4751-4753; subparagraph (a)(2) imposes a $100 per ounce tax on transfers to non-registered persons.

Although the indictment is not explicit, it has been assumed by all parties that appellee was not registered under the provisions of 26 U.S.C. 4751-4753 (App. C. 22-24, *infra*). Moreover, under 26 U.S.C. 7491, in the absence of proof to the contrary, a defendant is presumed not to have complied with the registration provisions of the Act.

If he had been registered, then there clearly could be no possible violation of the privilege against self-incrimination, since federal registration is conditioned upon a showing that the activity or business to be conducted by the registrant is lawful where conducted. See 26 C.F.R. 152.22, 152.23 (App. C. 24-26, *infra*.).

pressed in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, his privilege against self-incrimination constituted a complete defense to the prosecution (App. A. 14-17, 18). On motion for reconsideration, the government urged that the Marihuana Tax Act, and particularly the acquisition provisions under which appellee was indicted, do not, as administratively construed and applied, compel any incriminating disclosures, since persons who are not registered or registrable are not allowed to pre-pay the tax and obtain an order form to sanction the transfer of marihuana. The government argued that, under this construction, the statute operates simply as a bar to certain conduct—*i.e.*, the acquisition of marihuana by one who is not registered and cannot lawfully register—and thus in no sense touches upon the values protected by the privilege against self-incrimination. At that juncture, the district court alternatively ruled that if appellee could not, as urged by the government, pay the tax, there was no basis for the indictment (App. B. 19).

THE QUESTIONS ARE SUBSTANTIAL

1. The decision of the district court bars criminal enforcement of an important federal statute that has been the basis of hundreds of prosecutions over a period of thirty years and has been sustained against other challenges to its validity. See *United States* v. *Sanchez*, 340 U.S. 42. In *Leary* v. *United States*, No. 65, this Term, this Court will be considering the relation between the Fifth Amendment's privilege against

self-incrimination and a companion section of the marihuana control laws, 26 U.S.C. 4744(a)(2), prohibiting the transportation of marihuana by a person who has failed to pay the tax imposed under 26 U.S.C. 4741(a)(2).[2] We shall argue more fully in *Leary* that the transfer provisions of the Marihuana Tax Act—including the provision under which appellee was indicted—have consistently been interpreted by the agencies entrusted with administration of the Act (the Internal Revenue Service and the Bureau of Narcotics) *in pari materia* with the Harrison Anti-Narcotic Act of 1914 (now 26 U.S.C. 4701-4736), so that transfers to non-registered persons are completely prohibited.[3] Our position is that, in light of this administrative interpretation and application, prosecution of an unregistrable person for nevertheless obtaining marihuana does not violate the privilege. The present case involves a question of statutory construction similar to that presented in *Leary*.

2. The district court, on motion for reconsideration, disputed this construction. It recognized that the administrative construction—that in these circumstances the Act constitutes a direct ban on mari-

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[2] Section 4744(a)(2) was added to the Marihuana Tax Act as part of the Narcotic Control Act of 1956 in order to facilitate the proof of venue. See S. Rep. No. 1997, 84th Cong., 2d Sess. 8 (1956).

[3] Under the Harrison Act, 26 U.S.C. 4705(a) provides that transfers of narcotics must be made pursuant to an order form given by the transferee to the transferor. Subsections 4705(f) and (g) expressly provide that such forms will be given only to those who are registered and only for use in connection with a "lawful" business or "legitimate" profession. See *United States* v. *Doremus*, 249 U.S. 86; *Nigro* v. *United States*, 276 U.S. 332.

huana handling—would prevent a conflict with the privilege against self-incrimination, but the court concluded that such a construction would be inconsistent with the congressional intent and the statutory language.

Although Congress did not use explicit terms, such as those used in the Harrison Act, to prohibit the transfer of marihuana to non-registered persons, the agencies involved have from the outset administered the Marihuana Tax Act as so intended and limited. The regulations promulgated shortly after the Act was passed contained the basic provisions underscoring this construction. See 2 Fed. Reg. 2054 (October 1, 1937). Under the regulations, following the statutory plan, the transfer tax is payable in conjunction with the obtaining of the order form which a transferee must issue to the proposed transferor to authorize the transaction. 26 U.S.C. 4741(b) (App. C. 21, *infra*); 26 C.F.R. 152.63. For more than thirty years, however, the regulations have provided for the issuance of order forms only to registrants, since the application for the order form, which is to accompany the tendered transfer tax, must be signed by the same person who signed the application for registration (or by a person authorized by a previously filed power of attorney to act on the registrant's behalf). 26 C.F.R. 152.66, 152.67 (App. C. 26-27). Unless the district director is satisfied that the signature on the application for the order form is authentic, it will not be honored. 26 C.F.R. 152.68 (App. C. 27). And since 1964 the regulations have made express what had always been re-

garded as implicit, namely, that only one who after investigation is found to be legally qualified and entitled under local law to engage in the activities for which registration is sought, will be allowed to register. 26 C.F.R. 152.22, 152.23 (App. C. 24-26).

The result of this administrative application of the statute is that only those who would, by definition, not be incriminating themselves are allowed to engage in marihuana transactions. As to all others, like appellee, the federal statute stands simply as a prohibition; the prohibition is unrelated to any disclosure of information, for the agencies do not expect disclosure by such persons and would treat any attempt to pre-pay the transfer tax and to obtain an order form as irrelevant and meaningless under the Act.

In substance and effect, the Marihuana Tax Act operates like any statute regulating the eligibility for carrying on a trade or profession. Thus, a charlatan with only a tenth-grade education could not invoke the privilege against self-incrimination to defeat a prosecution for practicing medicine without a license, by arguing that if he were to have applied for authority he would have disclosed something incriminatory—like the intention to practice medicine though unqualified, or perhaps a link to previous, unauthorized practice. He, like appellee, is not within the class eligible to comply with statutory criteria, and he, like appellee, has no privilege to go forward and engage in unauthorized activities.

3. Contrary to the view of the court below, this long-standing administrative construction is both con-

sistent with the language and purposes of the Act and with the present indictment. The district court was apparently troubled by the words in Section 4744(a) which speak of "any person who is a transferee required to pay the transfer tax imposed by section 4741(a)". The government is not arguing, and the agencies have never found, that unregistrable individuals like appellee are not subject to the transfer tax; the government's position is only that such persons cannot *pre*-pay the tax and obtain an order form to sanction the transaction. But if the transfer is consummated nevertheless, it is a taxable transaction for which the transferee is civilly (as well as criminally) liable.

This construction is fully warranted by the purposes of the Act. In explaining the bill both the Senate and the House Committees stated:

> * * * the bill is designed, through the occupational tax and order-form procedure, to publicize *legitimate* dealings in marihuana *and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses* [emphasis added].[4]

From this language, it is clear that Congress manifested a dual purpose: first, to "publicize" "legitimate" transfers of marihuana; and second, to "prevent" transfers to non-registered persons—*i.e.*, "those who [would] put [marihuana] to illicit uses"—by imposing a prohibitive tax and punishing those who acquire marihuana without paying this tax.

---

[4] S. Rep. No. 900, 75th Cong., 1st Sess. 3 (1937); H. Rep. No. 792, 75th Cong., 1st Sess. 2 (1937).

While Congress could have used the same language as in the Harrison Act to express this intention, the indirect method adopted by Congress for achieving this result is readily understandable. At the time the Marihuana Tax Act was enacted in 1937, not all of the states had meaningful laws against the illicit handling of marihuana. See Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1936*, p. 58. The Congress of 1937 may have thought it appropriate to avoid such a direct, categorical ban, while at the same time providing the substance and machinery for that result. Before long, however, all the states had adopted comprehensive legislation regulating the transactions in marihuana. In that context, the administrative construction that the transfer tax could not be pre-paid by, and order forms issued to, those not registrable as entitled to carry on the activities under state law brought about the result favored by Congress—an absolute federal prohibition on marihuana transfers for other than medical, scientific, or industrial purposes. See *United States* v. *Sanchez*, *supra*, 340 U.S. at 44. This practice comports with the expressed purpose of Congress to keep the drug from the illicit market. Cf. *United States* v. *Doremus*, *supra*, 249 U.S. at 94. Prosecution of unregistered and unregistrable persons who acquire marihuana violates neither the privilege against self-incrimination nor the purpose of the statute.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

AUGUST 1968.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

OPINION AND ORDER

Defendant is charged by indictment with being a transferee of and acquiring a quantity of marihuana without having paid the tax imposed by law, in violation of Title 26, United States Code, Section 4744 (a) (1).

Following his plea of not guilty upon arraignment, defendant filed a motion to dismiss the indictment. In its consideration of this motion, the Court has had the assistance of the supporting and contra memoranda.

Title 26, United States Code, Section 4741 (a) provides:

> (a) Rate.—There shall be imposed upon all transfers of marihauna which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:
>
> > (1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof. . . .

Section 4742, which forms the basis for determining taxable transfers, provides:

(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions.—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) Professional practice.—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) Prescriptions.—To a transfer of marihuana, made in good faith by a dealer to a

consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: Provided, That such prescription shall be dated as of the day on which signed and shall be signed by the psysician, dentist, veterinary surgeon, or other practitioner who issues the same: Provided further, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) Exportation.—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials.—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Terri-

> torial, District, county, or municipal or insular hospitals or prisons.
>
> (5) Certain seeds.—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753. . . .

Failure to pay the tax imposed is a violation of Title 26, United States Code, Section 4744(a)(1):

> (a) Persons in general.—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—
>
> (1) To acquire or otherwise obtain any marihuana without having paid such tax. . . .

The basis of defendant's motion is the allegation that the foregoing statutory scheme is, at least as to him, violative of the Fifth Amendment to the United States Constitution in that it requires a person to incriminate himself.

What has evidently prompted this motion is a group of decisions recently entered by the United States Supreme Court. *Marchetti* v. *United States*, 36 U.S.L. Week 4143 (Jan. 29, 1968); *Grosso* v. *United States*, 36 U.S.L. Week 4150 (Jan. 29, 1968); *Haynes* v. *United States*, 36 U.S.L. Week 4164 (Jan. 29, 1968). In these cases it was determined that criminal prosecutions under the statutes imposing the annual occupational tax on gamblers,[1] the requirement to register before engaging in the business of accepting wagers,[2] the excise tax on wagering,[3] and a criminal

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[1] Title 26, United States Code, Section 4411; *Marchetti*.

[2] Title 26, United States Code, Section 4412; *Marchetti*.

[3] Title 26, United States Code, Section 4401; *Grosso*.

penalty on possessors of "unregistered firearms"[4] were each subject to an absolute defense in the form of an assertion that the statute was unconstitutional inasmuch as each one had the effect of compelling the respective defendants, and others similarly situated, to incriminate themselves. The questioned statutes required disclosure of past, present or prospective activities in areas "permeated with criminal statutes." *Marchetti, supra.* Compliance with any of the statutory requirements were directed at persons inherently suspect of criminal activities and created real, appreciable and substantial hazards of self-incrimination. *Ibid.* The hazards were particularly emphasized by the further statutory requirement that a list of all such taxpayers be made available for public inspection. Title 26, United States Code, Section 6107.[5]

A reading of the statutory tax scheme presently in question discloses that it, like those previously declared "unconstitutional," raises more than merely imaginary hazards of self-incrimination. The hazards here are likewise real, appreciable and substantial, and the statutory requirements, with the many exclu-

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[4] Title 26, United States Code, Section 5851; *Haynes.*

[5] That section provides that:

> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

sions, are primarily directed at those who are inherently suspect of criminal activities.[6] Again, as was

[6] In Ohio, criminal penalties are provided for persons who are subject to the taxing provisions herein questioned. Ohio Rev. Code, §§ 3719.01-3719.36, 3719.99 (1953). Similar statutes prevail in other jurisdictions. See, e.g., Ala. Code, Tit. 22, §§256-258 (1958); Alaska Stat. §§17.10.010-17.10.240 (1962); Ariz. Rev. Stat. §§ 36-1001-36-1024 (1956); Ark. Stat. §§ 82-1001-82-1024 (1947); Cal. Health and Safety Code, §§ 11001-11853 (1964); Colo. Rev. Stat. §§ 48-6-1 - 48-6-22 (1953); Conn. Gen Stat. §§ 19-244 - 19-268 (1958); Del. Code Ann., Tit. 16, §§ 4701-4722 (1967); Fla. Stat. Ann. §§ 398.01-398.23 (1963); Ga. Code Ann. §§ 42-801 - 42-822, 42-9917 - 42-9919 (1957); Hawaii Rev. Laws §§ 52-10 - 52-39 (1955); Idaho Code §§ 37-2301 - 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 - 22-49 (1964); Ind. Stat. Ann. §§ 10-3519 - 10-3550 (1956); Iowa Code Ann. §§ 204.1-204.25 (1946); Kan. Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev. Stat. §§ 218.010-218.240 (1962); La. Stat. Ann. 40:961-40:984 (1951); Me. Rev. Stat. Ann., Tit. 22, §§ 2361-2380 (1964); Md. Ann. Code, Art. 27, §§ 276-306 (1957); Mass. Ann. Laws, c. 94 §§ 197-217D (1957); Mich. Comp. Laws Ann. §§ 335.51-335.77 (1961); Minn. Stat. Ann. §§ 618.01-618.25 (1963); Miss. Code Ann., Tit. 25, c. 2 (1942); Mo. Rev. Stat. Ann., c. 195 (1959); Mont. Rev. Codes Ann. §§ 54-101 - 54-128 (1947); Neb. Rev. Stat. §§ 28-451 - 28-472.01 (1943); Nev. Rev. Stat. § 453.010 (1963); N.H. Rev. Stat. Ann., c. 318-A, §§ 1-26 (1964); N.J. Rev. Stat. Ann., Tit. 24, c. 18 (1940); N.M. Stat. §§ 54-7-1 - 54-7-51 (1953); N.Y. Pub. Health Law, Art. 33 (1953); N.C. Gen. Stat., c. 90, Art. 5 (1958); N.D. Cont. Code Ann. §§ 19-03-01 - 19-03-32 (1960); Okla. Stat. Ann., Tit. 63, §§ 466-469A (1963); Ore. Rev. Stat., Tit. 37, c. 474 (1967); Pa. Stat. Ann., Tit. 35, §§ 780-1 - 780-31 (1964); R.I. Gen. Laws Ann. §§ 21-28-1 - 21-28-66 (1956); S.C. Code Ann. §§ 32-1461 - 32-1495 (1962); S.D. Code, Tit. 22, §§ 1301-1324 (1939); Tenn. Code Ann. §§ 52-1301 - 52-1323 (1966); Tex. Pen. Code Ann., Art. 725b (1961); Utah Code Ann. §§ 53-13a-48 (1953); Vt. Stat. Ann., Tit. 18, §§ 4141-4163 (1959); Va. Code Ann., Tit. 54, §§ 487-519 (1950); Wash. Rev. Code §§ 69.33.220-69.33.960 (1959); W.Va. Code Ann. §§ 16-8A-1 - 16-8A-26 (1961); Wis. Stat. Ann. §§ 161.275 (1957); Wyo. Stat. Ann., Tit. 35, §§ 348-371 (1957).

the case of persons who complied with the statutes challenged in *Marchetti, Grosso,* and *Haynes,* those who pay the tax imposed by § 4741(a) are subject to having their names published in a list made available to interested prosecuting authorities by virtue of § 6107.[7]

As in the recent Supreme Court trilogy, this Court must also consider the relevance of the "required records" doctrine of *Shapiro* v. *United States,* 335 U.S. 1 (1948). The same elements which served to distinguish the situations of those cases from that of *Shapiro* are present in the instant matter. Stated otherwise, defendant was "required simply to provide information, unrelated to any records which he may have maintained," there were no "public aspects" to the information sought, and the requirements here are directed to a "selective group inherently suspect of criminal activities." *Marchetti; Albertson* v. *SACB,* 382 U.S. 70, 79 (1965); *Shapiro.* Similarly distinguishable is *United States* v. *Sullivan,* 274 U.S. 259 (1927).

Finally, as in *Marchetti, Grosso,* and *Haynes,* this Court does not feel it within its province to engraft immunity restrictions[8] on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities. § 6107. See also, *United States* v. *Sanchez,* 340 U.S. 42 (1950). It is for the legislature, rather than the judiciary, to make new law; the judiciary can only say whether a statutory

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[7] See, *United States* v. *Sanchez,* 340 U.S. 42 (1950), as to the obviousness of the Congressional intent to aid in the regulation of the illicit traffic in marihuana.

[8] See *Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52 (1964), as an example of immunity restrictions imposed within the province of the judiciary.

enactment of legislative intent, or its enforcement, in a particular instance, is constitutionally permissible.

WHEREFORE, the Court determines that the defendant has properly asserted the constitutional privilege against self-incrimination as a total defense to prosecution in this case. However, the Court also feels compelled to add that nothing determined herein serves as a holding that the marihuana tax provisions are unconstitutional or that the states may not continue to enforce their statutes prohibiting the sale, possession, etc., of marihuana. As to the application of the federal tax provisions, their enforcement through penalties may continue against persons not confronted by real, appreciable or substantial hazards of self-incrimination, or persons who are otherwise outside of the privilege's protection.

The motion to dismiss the indictment is GRANTED.

/s/ JOSEPH P. KINNEARY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

ORDER

This matter is before the Court on the motion of the United States for reconsideration of the Court's order of March 27, 1968, dismissing the indictment.

The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.

If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741 (a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

WHEREUPON, the Court determines that defendant's motion was properly granted, and the dismissal of the indictment shall stand as the Order of the Court.

/s/ JOSEPH P. KINNEARY
United States District Judge

APPENDIX C

STATUTES—Marihuana Tax Act of 1937, now 26 U.S.C. 4741, *et seq.*, provides in relevant part:

26 U.S.C. 4741:

(a) Rate.

There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742:

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register

under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741 (a).

26 U.S.C. 4751:

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practitioners.

Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities;

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, com-

pounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4753:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

REGULATIONS—Title 26, Code of Federal Regulations provides in relevant part:

* * * * *

Subpart C—Special Taxes
REGISTRATION

* * * * *

§ 152.22 Investigation of applicants other than millers.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic district supervisor for investigation, re-

port, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration. The provisions of this section shall not apply in the case of any application to which the provisions of § 152.21 apply.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic district supervisor, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the narcotic district supervisor shall be returned by him to the district director with recommendation for approval or disapproval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The application together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the supervisor, unless a longer time shall be required within which to complete an investigation. In the latter event the district supervisor shall, upon or before the expiration of the said 10-day period, so notify the district director stating the estimated additional time required.

§ 152.23 Evidence of qualification.

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

* * * * *

Subpart D—Transfer Taxes

Rates of Tax

* * * * *

Order Forms

§ 152.66 Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152-.62), plus 2 cents in payment for the order form.

§ 152.67 Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be

signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature so shown is his signature.

§ 152.68 Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 366

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PRESTON COVINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court dated March 27, 1968, dismissing the indictment (R. 6–11) is reported at 282 F. Supp. 886. The opinion dated May 6, 1968, denying reconsideration (R. 20), is not reported.

JURISDICTION

The order of the district court, dismissing the indictment on the ground that prosecution under the statute (26 U.S.C. 4744(a)(1)) would either violate the privilege against self-incrimination or fall outside the terms of the statute, was entered on May 6, 1968 (R. 20). Notice of appeal to this Court was filed on June 4, 1968 (R. 21). This Court noted probable juris-

diction on October 21, 1968 (R. 22). Jurisdiction rests on 18 U.S.C. 3731.

STATUTES AND RULES INVOLVED

The relevant statutes and rules (26 U.S.C. 4741–4744, 4751–4753, 4771, 4773, 4775, 6107, 7237(e); 26 C.F.R. 152.19–152.20, 152.22–152.23, 152.30–152.36, 152.61–152.68, 152.105, 152.131) are set forth in the Appendix, *infra*, pp. 27–40.

QUESTIONS PRESENTED

1. Whether the provision of the Marihuana Tax Act (26 U.S.C. 4744(a)(1)) prohibiting the acquisition of marihuana by one who has not paid the tax imposed by 26 U.S.C. 4741(a)(2) impinges upon the privilege against self-incrimination when the statute is construed and applied as not permitting pre-payment of the tax by those whose handling of marihuana would violate state law.

2. Whether Congress has authorized prosecution under 26 U.S.C. 4744(a)(1)—punishing the acquisition of marihuana by one who has failed to pay the tax imposed by 26 U.S.C. 4741(a)(2)—when the defendant could not have pre-paid the transfer tax because not lawfully entitled to register as a marihuana handler.

STATEMENT

Appellee was charged in a one-count indictment (R. 3) drawn under the Marihuana Tax Act, alleging that he violated 26 U.S.C. 4744(a)(1) by obtaining 737.1 grams of marihuana without having paid the

transfer tax imposed by 26 U.S.C. 4741(a).[1] On appellee's motion (R. 4–5), the trial court dismissed the indictment, holding that, under the principles expressed in *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States;* 390 U.S. 62, and *Haynes* v. *United States,* 390 U.S. 85, his privilege against self-incrimination constituted a complete defense to the prosecution (R. 6–11). On motion for reconsideration (R. 12–19), the government urged that the Marihuana Tax Act, and particularly the acquisition provisions under which appellee was indicted, do not, as administratively construed and applied, compel any incriminatory disclosures, since persons who are not lawfully registered or registrable are not allowed to pre-pay the tax and obtain an order form to sanction the transfer of marihuana. The government argued that, under this construction, the statute operates simply as a bar to certain conduct—*i.e.,* the

[1] Section 4741(a) imposes transfer taxes at two rates. Subparagraph (a)(1) imposes a $1 per ounce tax on all marihuana transfers to persons who are registered under the terms of Sections 4751–4753; subparagraph (a)(2) imposes a $100 per ounce tax on transfers to nonregistered persons.

Although the indictment is not explicit, it has been assumed by all parties that appellee was not registered under the provisions of 26 U.S.C. 4751–4753. Moreover, under 26 U.S.C. 7491, in the absen of proof to the contrary, a defendant is presumed not to have complied with the registration provisions of the Act.

If he had been registered, then there clearly could be no possible violation of the privilege against self-incrimination, since federal registration is conditioned upon a showng that the activity or business to be conducted by the registrant is lawful where conducted. See 26 C.F.R. 152.22, 152.23 (App. *infra,* pp. 35–36).

acquisition of marihuana by one who is not registered, whether he can lawfully register or not—and thus in no sense touches upon the values protected by the privilege against self-incrimination. At that juncture, the district court alternatively ruled that if appellee could not, as urged by the government, pay the tax, there was no basis for the indictment (R. 20).

SUMMARY OF ARGUMENT

I

A. The provision of the Marihuana Tax Act under which appellee was indicted prohibits the acquisition of marihuana by one who has not paid the $100 per ounce transfer tax imposed upon unregistered transferees. The agencies which administer this Act have consistently construed and administered it *in pari materia* with counterpart provisions found in the Harrison Narcotic Act of 1914. Under this construction, unregistered persons—like appellee—would not be permitted to obtain order forms authorizing the acquisition of marihuana even if they were willing to pay the $100 per ounce tax. Rather, the agencies have interpreted the Congressional plan as designed to keep marihuana out of the hands of those who would use it for illicit uses. For this reason, only those whose handling of the drug would be lawful under local law are allowed to register and thus to qualify for federal order forms upon prepayment of the marihuana transfer tax. As to all other persons, the Act constitutes a direct and absolute federal prohibition against the acquisition of marihuana.

This administrative construction is in complete harmony with the intent of Congress. Concerned about the use of marihuana for smoking or other illicit purposes, Congress imposed a $100 per ounce tax on transfer to unregistered persons—*i.e.*, those who, it foresaw, would in all probability use marihuana for illicit purposes—with the object and expectation that the tax rate would be completely prohibitive. The regulations adopted by the administrative agencies effectuate that clearly expressed legislative goal.

Congress chose to write the prohibition in the form of a taxing statute because it was then concerned about the reach of its constitutional powers. Although Congress may have been overly cautious in framing the prohibition as it did, it is nevertheless clear that Congress did intend to prohibit all transfers of marihuana to unregistered persons, and to punish those who violated that command. Under the statute as enacted and administered, the penal provisions do apply to the acquisition of marihuana by those who are not eligible for authority to obtain the drug.

B. As construed and applied, the statute under which appellee was indicted presents no conflict with the privilege against self-incrimination. Unregistered persons like appellee are not compelled to pay the tax; indeed they are not even permitted to do so. Thus, the statute calls for no incriminatory disclosures, since only those whose handling of the drug would be lawful are expected and allowed to register, pre-pay the transfer tax, and obtain order forms. Any claim that appellee proceeded to acquire marihuana despite the Act's prohibition only because he thought

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he had a constitutional privilege to do so is premature, since this case is here on appeal from the dismissal of an indictment based on a threshold question of law. An argument based on fear of incrimination is at most a defense that must be developed at trial. Moreover, any such claim may be immaterial; fear of incrimination does not provide a valid defense absent a showing that an attempt to pay the transfer tax would in fact have presented a "real" hazard of incrimination. In light of pertinent statutory provisions and administrative practice it is unlikely that such a showing could be made.

II

A. Congress did not exceed its constitutional powers in legislatively prohibiting transfers of marihuana to those who would use it in the illicit market and who would obviously attempt to evade payment of any taxes imposed upon all persons handling marihuana. Similar provisions in the Harrison Narcotic Act have twice been held constitutional by this Court as against a similar claim. *United States* v. *Doremus*, 249 U.S.C. 86; *Nigro* v. *United States*, 276 U.S. 332. Although less revenue is collected under the Marihuana Tax Act than under the Harrison Narcotic Act, that monetary distinction does not invalidate the otherwise proper legislation.

B. While the published regulations amply explain the administrative implementation of the Act, it is unnecessary to look beyond the plain words of the statute to recognize the elements of criminal liability. The Act on its face fairly notifies any person considering obtaining marihuana that it is a federal crime

to do so unless a transfer tax has first been paid. It is immaterial whether, had he sought to pay the tax and to obtain an order form, his attempt would have been rejected on grounds of ineligibility. The acquisition of non-tax-paid marihuana is what the statute outlaws.

C. Congress intended that the difference in transfer tax rates as between registered and unregistered transferees be enforced in the same manner throughout the United States. The taxing measure applies uniformly to similarly situated members of each class of taxpayers and thus conforms to the geographical "uniformity" requirement of the Constitution. A taxing statute does not fall short of the requisite uniformity because its impact in each state might vary because of differences in state or local law.

ARGUMENT

The statute under which appellee was indicted (26 U.S.C. 4744(a)(1)) is part of a comprehensive taxing plan (Marihuana Tax Act of 1937) designed, on the one hand, to raise revenues by taxing legitimate dealings in marihuana and, on the other, to curb all illegitimate traffic in that drug. The question of the validity of a companion statute (26 U.S.C. 4744(a)(2)), in light of the privilege against self-incrimination, is before this Court in *Timothy F. Leary* v. *United States*, No. 65, this Term. Although the two statutes differ somewhat in focus—Section 4744(a)(2) prohibits the *transportation* of marihuana by one who has acquired it without having paid the required tax, whereas 26 U.S.C. 4744(a)(1) simply prohibits

the *acquisition* of marihuana without having paid the tax—there is no significant distinction between the two under Fifth Amendment standards. The defendants in both cases have claimed that application for and acquisition of an order form—a step necessary to payment of the transfer tax—would have incriminated them, and thus that the convictions are invalid under the principles set forth in the decisions in *Marchetti, Grosso,* and *Haynes, supra.* We have fully explained the government's position on that contention in our brief in *Leary* and we shall not repeat the same arguments in detail here. After summarizing our views on the self-incrimination issue, we will discuss the contention that if the statute is construed as we suggest then the present indictment fails to state an offense. In addition, we take this opportunity to discuss several of the contentions raised in the brief of the American Civil Liberties Union as *amicus curiae,* which has been submitted in connection with *Leary* but which *amicus* asked also to be considered in the present case.

I

THE MARIHUANA TAX ACT, AS CONSTRUED AND APPLIED, DOES NOT COMPEL THE DISCLOSURE OF ANY INFORMATION WHICH COULD BE INCRIMINATORY

A. ALTHOUGH DRAWN AS A TAX STATUTE, THE ACT WAS INTENDED, AND HAS BEEN PROPERLY CONSTRUED ADMINISTRATIVELY, TO PRECLUDE THE ACQUISITION OF ORDER FORMS AND PRE-PAYMENT OF THE TRANSFER TAX BY NON-REGISTRANTS

1. As set out more fully in our brief in *Leary* (pp. 13–16), Congress, in enacting the Marihuana Tax Act

in 1937, evinced a dual purpose: to raise revenue by imposition of an occupational and transfer tax on *legitimate* dealers in marihuana, and to eliminate the widespread use of marihuana by smokers and addicts.[2] In order to achieve this two-fold objective, the Act imposes an annual occupational tax on all persons who desire to handle marihuana legitimately (26 U.S.C. 4751; 26 C.F.R. 152.19), following the classifications of permissible handlers under the Uniform Narcotic Drug Act (9B Uniform Laws Ann., pp. 409 *et seq.*). The only persons who are allowed to register and pay this occupational tax are those who are lawfully qualified to deal in marihuana under state and local law (26 C.F.R. 152.22–152.23). In order to aid in the collection of these taxes, and to prevent the transfer of marihuana into illicit channels where the tax could not conveniently be assessed, the occupational tax and registration requirements are complemented by restrictive transfer provisions. Thus the Act, *on its face*,[3] imposes a tax of $100 per ounce upon a transferee who has not paid the occupational tax and registered under the Act's requirements (26 U.S.C. 4741(a)(2); 26 C.F.R. 152.61–152.62).[4]

To effectuate this same policy the Act makes unlawful any transfer of marihuana (with ~~irrelevant~~ irrelevant exceptions), whether to a registrant or non-registrant,

[2] See, *e.g.*, S. Rep. No. 900, 75th Cong., 1st Sess., p. 2 (1937) (hereafter "S. Rep."), H. Rep. No. 792, 75th Cong., 1st Sess., p. 1 (1937) (hereafter "H. Rep.").

[3] See discussion *infra*, pp. 17–18.

[4] Transfers to registered persons are taxed at a rate of $1 per ounce (26 U.S.C. 4741(a)(1)).

unless the transfer is carried out in pursuance of a written order from the transferee on a form issued by the Secretary of the Treasury (26 U.S.C. 4742; 26 C.F.R. 152.66).[5] In order to obtain the order form, which is in turn given to his seller, the prospective transferee must submit to the district director of Internal Revenue an application stating his name and address and that of the proposed transferor, a description, including the quantity, of the marihuana desired to be obtained, and the transferee's registry number, if so registered under the applicable provisions. A money order or check to cover the amount of the transfer tax must be remitted with the application (26 U.S.C. 4741(b), 4742(c); 26 C.F.R. 152.63, 152.66). If the application is accepted by the district director, he will affix a stamp—which represents payment of the appropriate tax (26 U.S.C. 4771; 26 C.F.R. 152.63–152.64)—to the order form and send it to the transferee for use in the transaction. Section 4744(a)(1)—under which appellee was indicted—makes it a crime for any person required to pay the transfer tax to obtain marihuana without having paid the appropriate tax.[6]

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[5] The Act exempts from the transfer tax and order form requirements certain medical, industrial, and governmental transfers (see 26 U.S.C. 4742(b)(1)—4742(b)(5)).

[6] Section 4744(a)(2)—which prohibits transportation of non-tax-paid marihuana by the transferee, and under which Leary was convicted—was added as part of the Narcotic Control Act of 1956 in order to facilitate the proof of venue. See H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 12; H. Rep. No. 2388, 84th Cong., 2d Sess., p. 1; S. Rep. No. 1997, 84th Cong., 2d Sess., p. 8.

2. Although the Act is on its face susceptible of a construction that would sanction sales of marihuana to non-registered persons by issuing them order forms upon payment of the $100 transfer tax, the two agencies charged with administering the Act (the Internal Revenue Service and the Bureau of Narcotics) have consistently, since passage in 1937, construed the Marihuana Tax Act *in pari materia* with the Harrison Anti-Narcotic Act of 1914 [7] and have developed a regulatory mechanism which prevents the issuance of order forms to those who are not registered and who cannot qualify for registration because their intended activities would violate state law.[8]

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[7] Under the Harrison Act, transfers of narcotic drugs must be made pursuant to an order form given by the transferee to the transferor. 26 U.S.C. 4705(a). Subsections 4705 (f) and (g) expressly provide that such forms will be given only to those persons who are registered and only for use in connection with a "lawful" business or "legitimate" profession. The constitutionality of these provisions was upheld in *United States* v. *Doremus*, 249 U.S. 86; see, also, *Nigro* v. *United States*, 276 U.S. 332.

[8] The Internal Revenue Service has advised us that it has no record that there has ever been an application for order forms submitted by a non-registrant, and the Service therefore never formulated a policy, in the form of a regulation or operating procedure, for processing such an application. They have pointed out, however, that the only provisions for disclosure of information by district directors are inapplicable to permit disclosure of the fact or the content of an application from a non-registrant. (See 26 U.S.C. 4773 and 26 U.S.C. 4775, which apply only to those who *are* registered. See, also, 26 U.S.C. 6107; 26 C.F.R. 152.104, 152.105, 152.131; compare 26 U.S.C. 7237(e).) Moreover, they have advised us that, since the decisions in *Marchetti*, *Grosso*, and *Haynes*, district directors have been instructed that if an application for order forms is sub-

This administrative construction is reflected in the regulations that were jointly promulgated by the Commissioner of Narcotics and the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, in 1937.[9] The regulations provide that applications for order forms must be signed by the same person who signed the application for registration,[10] and specify that before the application will be honored the district director must be satisfied, on the basis of a comparison of the signature on the application for an order form with that on the application for registration, that the order form application is "authentic." [11] As a result of these requirements, it is not possible for anyone to obtain marihuana order forms unless he has first registered.[12] And as we have

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mitted by an unregistered person, the application should be treated as confidential and no disclosure made to any enforcement or investigative agencies either of the contents of the application or of the fact that it has been submitted. District directors have been ordered merely to return the application with an explanation to the effect that, since the applicant is not registered, he cannot qualify for an order form.

[9] 2 Fed. Reg. 2054 *et seq.* (1937); now 26 C.F.R. Pt. 152.

[10] Article 47, 2 Fed. Reg. 2059 (1937); now 26 C.F.R. 152.67.

[11] Article 48, 2 Fed. Reg. 2059 (1937); now 26 C.F.R. 152.68.

[12] In its *amicus* brief, the American Civil Liberties Union disputes the administrative construction of this regulation as requiring that the application for an order form (an integral part of process of pre-paying the transfer tax) be signed by the same person who signed the application for registration as required by 26 C.F.R. 152.25. *Amicus* argues that since the requirement is preceded by the word, "Generally", the inclusion of this conditional word means that in some instances registration is not a condition to the acquisition of an order form and pre-payment of the tax. But the regulations themselves set forth the only situation in which a departure from

seen (*supra*, p. 3), only those whose handling of marihuana would be lawful are eligible for registration.

Thus, under the Marihuana Tax Act and implementing regulations, only persons whose handling of marihuana would otherwise be lawful under state or local law are expected—and allowed—to obtain federal authorization to engage in marihuana transactions by pre-paying the transfer tax and obtaining order forms. Persons who, like appellee,[11] are neither registered nor qualified to seek registration can comply with this Act only by abstaining from any involvement with mari-

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the "generally" required procedure will be tolerated. Thus, under Section 152.67, when it would be "impracticable" for the person who signed the registration application to sign the application for an order form, the application for the form may be signed by another person—"provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director." Section 152.68 makes it undeniable that no casual or *ad hoc* applications for order forms will be honored; it states exhaustively that the signature on an application for forms "shall be compared with that appearing on the application for registration *or* in the power of attorney (see § 152.67)" before the application will be honored. (Emphasis added.)

Moreover, even assuming an ambiguity in the regulations, the Bureau of Narcotics and Internal Revenue Service have always construed these regulations as limiting issuance of order forms to those who are registered under the provisions of 26 U.S.C. 4751–4753. This construction by the agencies which have promulgated the regulations is entitled to controlling weight. *Udall* v. *Tallman*, 380 U.S. 1, 4; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414.

[11] Under 26 U.S.C. 7491, in the absence of production of evidence by a defendant that he is a marihuana registrant and has complied with the order form requirements, the contrary will be presumed. See note 1, *supra*.

huana. As to this class the Act stands as a direct and absolute federal prohibition against obtaining, concealing, transporting, or transferring marihuana.

3. The Court below ruled (R. 20), and *amicus* argues here, that such a construction is contrary to Congressional intent. But the legislative history demonstrates, on the contrary, that the settled administrative understanding of the Act is fully in accord with, and effectively implements, the stated goals of the legislation.

Although Congress concededly cast the controls on marihuana in the form of a taxing statute,[14] it is clear that Congress nevertheless intended, not only to raise revenue by taxing legitimate transfers of marihuana, but also to prohibit absolutely all transfers of marihuana to unregistered persons—*i.e.*, those who would most likely use the drug for illicit purposes. The Marihuana Tax Act was first proposed by the Department of the Treasury. A representative of the Department, testifying in favor of the bill at a congressional hearing, emphasized:

> In order to raise additional revenue *and to stamp out transfers to persons who would use marihuana for undesirable purposes*, it is further required that on any transfer which is required to be made in pursuance of an order form a transfer tax shall be imposed. This tax will be at the comparatively low rate of $1 per ounce, or fraction thereof, for transfers to registered persons, but at the rate of $100 per ounce, or fraction thereof, on transfers to persons who have not registered and

[14] The House Committee also observed, however, that various provisions of the bill could be sustained under the Commerce Clause or other powers of Congress. See H. Rep., p. 3.

> paid the special occupational tax whether or not they are required to register and pay the tax. It is made a criminal offense to acquire marihuana without having paid the transfer tax, when payment of such tax is required. *Since those who would consume marihuana are not eligible to register under the bill, and since the $100 tax on unregistered persons is designed to be prohibitive, such persons could not acquire marihuana.* [Emphasis added.][15]

In this light, it would be fatuous to impute to Congress a willingness to allow the wealthy to continue to indulge in the illicit trafficking of marihuana, while denying the same opportunity to those who were unable to afford the tax of $100 per ounce.[16] Congress simply intended to "stamp out" completely the use of marihuana for illicit purposes. The Internal Revenue Service and Bureau of Narcotics have administered the Marihuana Tax Act in accordance with that demonstrable intent to suppress *all* use of marihuana by smokers and addicts.

In our brief in *Leary* (p. 21), we suggested that Congress wrote the prohibition in the form of a taxing statute because it was concerned about the reach of its constitutional powers. As evidenced during the

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[15] *Hearings on H.R. 6385 before the House Committee on Ways and Means*, 75th Cong., 1st Sess. (hereinafter, *Hearings*), p. 8 (1937). Both Committees reported that one of the objectives of the legislation was to "prevent" marihuana from coming into the hands of persons who would put it to illicit uses. S. Rep., p. 3; H. Rep., p. 2.

[16] The prohibitive nature of the $100 tax was brought to the attention of Congress by testimony that the going market price for marihuana was $1 per ounce. *Hearings* at p. 14.

hearings before the House Committee on Ways and Means, the Department of the Treasury, sponsor of the bill, was concerned by the fact that it was only by a divided court that the express prohibitions contained in the Harrison Act (see 26 U.S.C. 4705(f) and 4705(g)), limiting the issuance of order forms to legitimate handlers of narcotic drugs under state and local law, had been sustained. See *United States* v. *Doremus*, 249 U.S. 86 (5–4), and *Nigro* v. *United States*, 276 U.S. 332 (6–3). The Treasury Department thus recommended—in what we suggest in retrospect was an abundance of caution—that the statute be framed as a taxing statute similar in form to the National Firearms Act which had that very year been sustained against constitutional challenge by a unanimous Court. *Sonzinsky* v. *United States*, 300 U.S. 506.[17] It may be that such caution was unnecessary, and that an explicit prohibition—the actual result of the Act's administration—which would have avoided the type of argument made here, might have proven preferable.[18] But speculation about the wisdom of the

[17] *Hearings*, at pp. 9–16. The Treasury Department chose not to amend the Harrison Act to apply to marihuana since there was a legitimate trade in marihuana hemp, and the Harrison Act did not provide the necessary flexibility to deal with the problems peculiar to marihuana. See *Hearings*, at p. 13.

[18] See the *Final Report* of the President's Advisory Commission on Narcotic and Drug Abuse, p. 32 (1963), wherein it was stated:

> The rate for transfers to persons who are not registered taxpayers is prohibitory. * * *
>
> * * * The amounts collected under the Harrison Act are relatively minor, and the Marihuana Tax Act yields nothing because the tax rate is deliberately prohibitive. Taxa-

particular course Congress has plotted to accomplish a lawful objective does not alter the fact that Congress *did* intend to prohibit any transactions in marihuana by unregistered persons. The administrative construction is thus in accord with congressional intent.

4. The district court held, as an alternative basis for dismissal, that if this construction is adopted "then there is no basis for the indictment" (R. 20). But this conclusion was apparently based upon the mistaken impression that the government regards the tax provisions of Section 4741(a) as "not applicable to the defendant" (*ibid.*). On the contrary, appellee is properly alleged to have been "a transferee of marihuana required to pay the transfer tax imposed by" Section 4741(a), whose acquisition of marihuana without having paid the tax is unlawful under Section 4744(a)(1). (See R. 3.) The government is not arguing, and the agencies have never found, that unregistrable individuals like appellee are not subject to the transfer tax; our position is only that such persons cannot *pre*-pay the tax and obtain an order form to sanction the transaction. But if the transfer is consummated nevertheless, it *is* a taxable transaction for which the transferee is civilly (and, as in this case, criminally) liable. The Internal Revenue Service does in fact frequently and

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tion is in fact only a guise for law enforcement and regulation.

The Advisory Commission then proceeded to recommend that existing narcotics controls relying on tax mechanisms be replaced by direct and express prohibitions based solely on the Commerce Clause. *Id.* at p. 36.

validly levy the tax on illicit transfers that have taken place, because the tax provisions do indeed apply to such transfers. See, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Guerra*, 237 F. Supp. 1 (D. Colo.), affirmed, 371 F. 2d 584 (C.A. 10).[19]

B. SO CONSTRUED, THE MARIHUANA TAX ACT DOES NOT CONTEMPLATE, MUCH LESS COMPEL, SELF-INCRIMINATION

Given the construction which the Internal Revenue Service and Bureau of Narcotics have placed on the tax and transfer provisions of the Marihuana Tax Act for some thirty years, it becomes readily apparent that there is no real danger of self-incrimination. To accomplish "'literal and full compliance' with all the statutory requirements" (*Grosso* v. *United States*, *supra*, 390 U.S. at 65), all appellee need do was to abstain from dealing in marihuana. Appellee was not required to obtain an order form and pay the transfer tax; indeed, any attempt to do so would not even have been permitted.

The *amicus* brief argues that the transfer provisions *seem* to allow payment of the transfer tax, and thus that a typical defendant could reasonably fear incrim-

[19] The fact that the Service makes such assessments is not inconsistent with our position that Congress intended an absolute federal ban against transfers to unregistered persons. Once the transfer has been made in violation of the Act, the intent of Congress is in part effectuated by imposing a civil sanction on the offender. *United States* v. *Sanchez*, *supra*, 340 U.S. at 45. Analogously, for example, it is illegal to embezzle the property of another. But if a person does embezzle, the proceeds of his actions are taxable income. *James* v. *United States*, 366 U.S. 213.

ination upon making such an attempt. That claim however, is premature in the present case. This case is here on appeal from dismissal of an indictment on the ground that the indictment fails on its face to state an enforceable offense. The argument about fear of incrimination—even an "imaginary"[20] fear—would be, at most, an affirmative defense under *Grosso*. If it can be shown that defendant was prepared to pay the tax of $100 per ounce but did not do so because of fear of incrimination, that issue may possibly arise.[21] But the issue is not presented by the statute on its face. This Court has made clear that the taxing statutes considered in *Marchetti*, *Grosso*, and *Haynes*, are valid taxing statutes. It has held only that a *proper* claim of the privilege against self-incrimination constitutes a *defense* to a prosecution for failure to pay the tax.[22]

Even as a defense to a prosecution it is doubtful that a mere statement of fear or belief by a marihuana transferee that he might incriminate himself would

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[20] *Marchetti* v. *United States*, *supra*, 390 U.S. at 53.

[21] It is not presented in *Leary*, because the evidence showed beyond dispute that Leary was aware of the administrative construction of the Act, and that he refrained from paying the tax, not because of any fear of incrimination, but because of a belief that he had an absolute right to use marihuana as part of his religious exercises.

[22] Whether prosecutions like the present one are distinguishable from those presented in the gambling and firearms tax cases because here the prosecution is for engaging in affirmative conduct, not simply for failing to pay a tax, is an issue which would be presented if appellee sought to show that he personally feared that an attempt to prepay the transfer tax would have been incriminatory.

be valid. The risk of self-incrimination must be considered objectively. If an attempt to obtain an order from and pay the transfer tax would not have in fact been incriminating, then a conviction under the statute (26 U.S.C. 4744) is valid notwithstanding the defendant's mistaken belief that he might have incriminated himself. As the Court explained in *Marchetti, supra,* 390 U.S. at 53: "The central standard for the privilege's application has been whether the claimant is confronted by substantial *and 'real,' and not merely trifling or imaginary, hazards of incrimination.*" (Emphasis added.) See, also, *Rogers* v. *United States,* 340 U.S. 367.[23] Here there is in fact no danger of incrimination. The *amicus,* recognizing (Br. 21–23) that there is no authority for a district director to reveal the fact that there has been an attempt by an unregistered person to obtain an order form and pay the tax (see note 8, *supra,* p. 11), speculates that a district director would, notwithstanding the lack of such authority, turn the information over to prosecuting authorities. Such speculation hardly meets the burden of the defendant to show that, had he applied for the order form and attempted to pay the tax, he would have incriminated himself.

[23] In *Rogers,* a witness invoked the privilege and refused to answer certain questions before a federal grand jury. A district court judge ruled that the privilege was not available, and ordered her to answer. She refused, and was convicted of contempt. This Court agreed with the district court that the privilege was not applicable, and affirmed the conviction for contempt notwithstanding the defendant's mistaken belief that the privilege was applicable.

II

OTHER ISSUES RAISED BY THE "*AMICUS CURIAE*" ARE INSUBSTANTIAL

Other challenges to the tax and transfer provisions of the Marihuana Tax Act, as construed and applied by the Internal Revenue Service and Bureau of Narcotics, are insubstantial.

A. *The Act is a valid tax measure.* As construed and applied by the Internal Revenue Service and Bureau of Narcotics, the transfer provisions of the Marihuana Tax Act operate to achieve the same result as do the similar, express provisions in the Harrison Narcotic Act (26 U.S.C. 4705 (f) and (g)). That is, only those persons who are lawfully registered may obtain an order form and pre-pay the transfer tax; as to all other persons, the statute stands as an absolute federal prohibition against the acquisition of the regulated drug. The constitutionality of this result under the Harrison Act, as against a claim that it exceeds the power of Congress, has been upheld on two occasions by this Court. *United States* v. *Doremus,* 249 U.S. 86; *Nigro* v. *United States,* 276 U.S. 332. The *amicus* does not challenge the continued validity of these decisions, but suggests (Br. 16–17, 25–26) that the transfer provisions of the Marihuana Tax Act are distinguishable since *less revenue* is collected from registered marihuana handlers than from narcotics handlers under the Harrison Act. In the circumstances, however, the distinction is irrelevant. Although it is true that there are presently only 88 registrants under the Marihuana

Tax Act, it by no means follows that the tax was invalid when passed. In the year following the passage of that Act, there were 3,665 persons so registered. See Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, pp. 60, 91 (1938) (producing approximately $4,000 in revenue). Although perhaps negligible, that amount of revenue sufficed to sustain the Act as an exercise of the tax power. See *United States* v. *Sanchez, supra;* cf. *Sonzinsky* v. *United States*, 300 U.S. 506.[24] We are aware of no principle of constitutional law which suggests (see *Amicus* Br. 16) that a taxing statute, valid when passed, is rendered invalid *nunc pro tunc* because at some later date the cost of collection exceeds gross revenue receipts.[25] That factor may raise a point appropriate for legislative reconsideration, but does not of its own force vitiate the statute.

B. *The Act gives fair notice as to the elements of criminal liability.* It cannot be said, as *amicus* argues, that the statute fails to give fair warning of the elements of criminal liability. The *amicus* contends that the statute on its face does not make sufficiently clear that the Internal Revenue Service and Bureau of Narcotics will not accept a pre-payment of the tax from unregistered persons, and thus that the statute as con-

[24] As pointed out in *Sonzinsky*, the occupational tax provisions of the National Firearms Act had yielded only $5,400 in 1934, and $4,400 in 1935 (300 U.S. 506, 514 n. 1) but the Court nevertheless upheld the measure as a valid regulatory tax statute.

[25] We further note that Congress *did*—contrary to the reading of the pertinent legislative history by the *amicus*—rely in part on the Commerce Power. See H. Rep., p. 3.

strued is unfair. Even if the premise were correct—which we dispute—the conclusion would not follow. The elements of the crime are clearly and succinctly set forth in the statute. Section 4744(a)(1) states in unequivocal language that it is a crime to purchase marihuana without having paid the tax, and Section 4744(a)(2) makes clear that it is a crime for a transferee who failed to pay the tax to transport marihuana. The elements of the crime are thus quite apparent. Whether or not the defendants were aware of the fact that the administrative agencies would not have accepted pre-payment of the transfer tax from unregistered persons does not detract from the fact they must have been aware that the statute made it illegal for them to purchase or transport marihuana on which they had not paid a transfer tax.[26]

C. *The tax provisions apply "uniformly" throughout the United States.* The *amicus* suggests (Br. 25) that the transfer tax violates Article I, Section 8,

[26] For the same reason, the suggestion (*Amicus* Br. 24–25, 26) that the construction placed upon the statute by the Internal Revenue Service and the Bureau of Narcotics was not clearly set forth in the Federal Register is not only incorrect but also irrelevant. The regulations which embody the construction placed on the statute by the administrative agencies were first published in the Federal Register in 1937 (2 Fed. Reg. 2054 *et seq.*) and were revised and re-published in 1964 (29 Fed. Reg. 3758 *et seq.*). In addition, as we have already shown above, whatever ambiguity might exist as to the policy adopted by the administrative agencies in carrying out the explicit intent of Congress on the question whether the tax may be pre-paid by nonregistrants, these defendants are chargeable with notice that the statutory provisions themselves made their conduct unlawful, since Section 4744(a) unambiguously makes it a crime to purchase marihuana without having paid the tax.

cl. 1, of the Constitution which provides that "all * * * Excises shall be uniform throughout the United States" because the rate of the tax imposed upon a transfer depends upon whether the transferee is registered ($1 per ounce) or unregistered ($100 per ounce), and because eligibility for registration—which is dependent upon state law—may vary from state to state. Although the rate of the tax does depend upon whether the transferee is registered, this purposeful classification applies in the same manner throughout the United States. The "uniformity" requirement demands no more than a "geographic" uniformity, *Knowlton* v. *Moore,* 178 U.S. 41, 98; *Fernandez* v. *Wiener,* 326 U.S. 340, 359, and in this sense, as to the respective classes of transferees, the statute applies uniformly.

We point out, furthermore, that the rate of the tax does not turn on the illegality of the transfer under state law. Compare *United States* v. *Constantine,* 296 U.S. 287. It is governed, rather, by whether or not the transferee is *registered.* While eligibility for registration does depend on state law, the $100 tax would apply, for example, to a professional pharmacist, who is eligible for registration but has not registered, and who nevertheless acquires marihuana.

Nor does the statute lack uniformity because some states might legislatively prohibit any legitimate dealing in marihuana (and thus, derivatively, preclude all registration), since it is well established that "a taxing statute does not fall short of the prescribed

uniformity because its operation and incidence may be affected by differences in state laws.''. *Fernandez, supra,* at 359.

CONCLUSION

For the reasons stated above, the judgment below dismissing the indictment should be reversed and the cause remanded for trial.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
PHILIP A. LACOVARA,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

NOVEMBER 1968.

APPENDIX

26 U.S.C. 4741 provides:

(a) Rate.

There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742 provides in pertinent part:

Order forms.

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to

transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

(c) Supply.

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana order to be plainly written or stamped thereon before delivering the same.

(d) Preservation.

Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be pre-

served in the records of the internal revenue district.

* * * * *

26 U.S.C. 4743 provides:

> The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form.

26 U.S.C. 4744 provides in pertinent part:

> (a) Persons in general.
>
> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be persumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

26 U.S.C. 4751 provides:

> Imposition of tax.
>
> Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities and thereafter on or before July 1 of each year, pay the following special taxes respectively:
>
> (1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practitioners.

Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities.

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year: *Provided,* That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4752 provides:

(a) Computation of tax.

Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) Liability in case of activities in more than one place.

In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) Liability in case of more than one activity by same person at same time.

Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed.

26 U.S.C. 4753 provides in pertinent part:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

* * * * *

26 U.S.C. 4771 provides in pertinent part:

§ 4771. Stamps.

(a) Method of payment.

(1) Stamps.

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

* * * * *

26 U.S.C. 4773 provides:

§ 4773. Inspection of returns, order forms, and prescriptions.

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705 (c)(2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue dis-

trict, upon the payment of a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested.

26 U.S.C. 4775 provides:

§ 4775. List of special taxpayers.

The Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702 (a), section 4751, or section 4752, upon payment of a fee of $1 for each 100 names or fraction therefore in the copy so requested.

26 U.S.C. 6107 provides:

§ 6107. List of special taxpayers for public inspection.

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

26 U.S.C. 7237 provides in pertinent part:

* * * * *

(e) Unlawful disclosure of information on returns and order forms.

Any person who shall disclose the information contained in the statements or returns required under section 4732(b) or 4754(a), in the duplicate order forms required under section 4705(e), or in the order forms or copies thereof referred to in section 4742(d), except—

(1) as expressly provided in section 4773,

(2) for the purpose of enforcing any law of the United States relating to narcotic drugs or marihuana, or

(3) for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana,

shall be fined not more than $2,000 or imprisoned not more than 5 years or both.

26 C.F.R. 152.19 provides:

Persons liable.

Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana. As to the liability of a person engaged in one or more of the foregoing activities to several taxes see § 152.29.

26 C.F.R. 152.20 provides:

Manner and time of registration.

Every person required to register pursuant to section 4753 shall execute and file, with the district director for the internal revenue district in which he proposes to engage in any activity mentioned in § 152.19, an application for registration on Form 678 and pay the special tax or taxes enumerated in § 152.29. Form 678 shall be executed by new applicants and approved by the district director before the ac-

tivity is commenced. Renewal applications shall be executed and filed on or before the succeeding July 1, and annually thereafter as long as liability is incurred. Form 678 may be obtained from the district director. For the purpose of the special tax imposed by section 4751, Form 678 shall be considered a return.

26 C.F.R. 152.22 provides:

Investigation of applicants other than millers.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration. The provisions of this section shall not apply in the case of any application to which the provisions of § 152.21 apply.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic district supervisor, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the narcotic district supervisor shall be returned by him to the district director with recommendation for approval or disapproval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The appli-

cation together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the supervisor, unless a longer time shall be required within which to complete an investigation. In the latter event the district supervisor shall, upon or before the expiration of the said 10-day period, so notify the district director stating the estimated additional time required.

26 C.F.R. 152.23 provides:

Evidence of qualification.

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

26 C.F.R. 152.30 provides:

Importers.

Every person who imports marihuana is subject to tax as an importer at the rate of $24 per annum in Class I. A manufacturer or compounder who is also an importer is not thereby required to pay more than one tax.

26 C.F.R. 152.31 provides:

Manufacturers and compounders.

Every person coming within the definition set out in § 152.11(b) is subject to tax as a manufacturer or compounder at the rate of $24 per annum in Class I.

26 C.F.R. 152.32 provides:

Producers.

Every person coming within the definition set out in § 152.11(c) is subject to tax as a producer at the rate of $1 per annum or fraction thereof in Class II.

26 C.F.R. 152.33 provides in pertinent part:

> Dealers.
>
> Generally, one who sells, gives away, or dispenses marihuana in any form, is subject to tax as a dealer at the rate of $3 per annum in Class III. * * *

26 C.F.R. 152.34 provides in pertinent part:

> Practitioners and interdistrict practice.
>
> (a) Physicians, dentists, veterinary surgeons, and other practitioners, including institutions, who prescribe, distribute, dispense, give away, or administer marihuana, and who are entitled to do so under the laws of the jurisdiction in which they practice, are subject to tax at the rate of $1 per annum or fraction thereof in Class IV.
>
> * * * * * *

26 C.F.R. 152.35 provides:

> Laboratory use.
>
> Chemists occupying an independent status and not that of employees, in other words, in business for themselves, who, being lawfully entitled so to do, make analyses of marihuana or use marihuana in analyzing other substances in a laboratory, and persons who produce or obtain and use in a laboratory any marihuana for the purpose of research, instruction, or analysis, if not registered as an importer, manufacturer, compounder, or producer, are subject to tax at the rate of $1 per annum or fraction thereof in Class V, provided no marihuana is manufactured or compounded for sale or for removal for consumption or sale.

26 C.F.R. 152.36 provides:

> Millers.
>
> Every person who at a mill manufactures or produces from the marihuana plant any fiber or fiber products is subject to tax as a miller at

the rate of $1 per annum or fraction thereof in Class VI.

26 C.F.R. 152.61 provides:

Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:

Amount of tax.

Where the transfer is to a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

26 C.F.R. 152.63 provides:

Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C.F.R. 152.64 provides:

Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine

or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:

Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:

Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides:

Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has

previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provides:

Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

26 C.F.R. 152.105 provides:

Records open to inspection.

All order forms, duplicate forms, prescription records, returns, and inventories required under the provisions of subchapter A, chapter 39, relating to marihuana, or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

26 C.F.R. 152.131 provides:

List of taxpayers.

The list of marihuana special-tax payers required by section 6107, shall be kept on Record 10, and may be inspected and copied in the district director's office at such reasonable and proper times as not to interfere with the district director's use of it, or exclude other persons from inspecting it.

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No. 366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PRESTON COVINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLEE

WILLIAM J. DAVIS
ATTORNEY FOR APPELLEE
855 EAST LONG STREET
COLUMBUS, OHIO

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B. The tax compels self incrimination in violation of the Fifth Amendment to the U.S. Constitution.

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BRIEF FOR THE APPELLEE

Opinions Below

As indicated in appellants brief, the District Courts opinion dismissing the indictment is reported in 282 F. Supp 886 and the Courts opinion denying reconsideration is unreported but is set forth in the Appendix to appellants brief (R.20).

JURISDICTION

The Goverment maintains that jurisdiction of the Court rests on 18 U.S.C. 3731, which authorized the goverment to take a direct appeal from a decision sustaining a plea in bar and from a dismissal of an indictment based on construction of the statute on which the indictment is founded.

QUESTIONS PRESENTED

Whether the Fifth Amendment to the U.S. Constitution bars prosecution and conviction under 26 U.S.C. 4744 (a) (1).

STATEMENT

Appellee was charged in a one court indictment with violating 26 (U.S.C. 4744 (a) (1), by obtaining 737.1 grams of marihuana without having paid the transfer tax imposed by 26 U.S.C. 4741 (a). Appellee moved to dismiss the indictment on the grounds set forth in Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62 and Haynes v. United States, 390 U.S. 85. The motion was sustained by the District Court on the grounds that appellee's privilege against self-incrimination was a complete defense to the prosecution.

The government moved for reconsideration on the grounds that the act as administratively construed did not compel incriminating disclosures. The Court ruled in thealternative that if appellee could not pay the tax, there was no basis for the indictment.

SUMMARY OF ARGUMENT

Chapter 39 of the Internal Revnue Code is entitled "Regulatory Taxes and Subchapter A, entitled "Narcotic Drugs and Marihuana is divided into three parts one being Part II entitled "Marihuana, and running from 26 U.S.C. 4741 to 26 U.S.C. 4762, and Part III being a general section (26 U.S.C. 4771 to 26 U.S.C. 4776) relating to narcotic and marihuana. The defendant bases his motion on a series of cases reported in 360 United States Reports. The cases in question are Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85. A careful reading of these cases indicates that they specifically overrule United States v. Kahriger 97 L ed 754 and Lewis v. United States 99 L ed 475 and as aptly stated by Chief Justice Warren in his dissent to Grosso v. U.S., these cases open the door for "new wave of attacks on a number of Federal registration statutes wherever the registration requirement touches upon allegedly illegal activities", See Grosso v. U.S., 390 U.S. 62. It is interesting to note that it was the opinion of the Chief Justice in his dissent that these three cases also affected the requirements for registration as to dealers in marihuana.

The defendant in the present case is charged with being the transferee of marihuana and with failing to pay the tax required by Title 26 U.S.C. Sec 4741 (a), said failure being a violation of 26 U.S.C. 4744 (a) (1). It follows from a careful reading of Haynes v. U.S., Grosso v. U.S. and Marchetti v. U.S. that the particular tax scheme on which the defendant faces the Court bears a substantial and close relation to the schemes involved in these three cases and especially in the Haynes case, since in the present case the defendant would be required to register as the transferee of contraband goods, to wit marihuana, which is a contraband punishable for possession under the laws of the State of Ohio. The nature of the information required by the statute is evidenced by the Notice and Demand served on the defendant by Narcotic Agent Jack L. Lloyd dated August 11, 1967, which would require the defendant to produce a copy of an offical order

form as required under Section 4742 of Internal Revenue Code indicating the transfer of marihuana. Since marihuana is contraband goods and is punishable in its possession both under the United States Code and under the statute of the State of Ohio, the information requested, the registration requested and the whole tax scheme is incriminatory, and we can only assume that here is a clear Governmental scheme to gather evidence from citizens in order to secure their conviction of frimes. This contravenes the privilege of the Fifth Amendment to the United States Constitution. See Albertson v. Subversive Activities Control Board.

Since the tax scheme invisioned by 26 U.S.C. 4741 (a) as applied to the defendant uhder this ifdictment with reference to violation of 26 U.S.C. 4744 (a) (1) involves a compulsory legal scheme requiring the defendant to admit that he is indulging in illegal activities which violate the laws of the United States and the laws of the State of Ohio (See Ohio Revised Code 3719.09), it is the contention of the defendant that said law is in violation of his privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. It follows that under the recent case law enunciated by the Court (Marchetti, Grosso and Haynes) the opinion of the District Court ought to be sustained.

As the government contentions that the tax statute has been construed administratively to preclude the acquisition of order forms and prepayment of the transfer tax by non-registrants and as so construed does not contemplate or compel self-incrimination, the District Court on the motion to reconsider gave an excellent answer to this devious argument. As follows:

" The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional."

" If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741 (a). If 4741 (a) is not applicable to defendant, then there is no basis for the indictment."

CONCLUSION

For the reasons stated above, the judgment below dismissing the indictment should be sustained.

Respectfully submitted.

William J. Davis

William J. Davis
Attorney at Law

SUPREME COURT OF THE UNITED STATES

No. 366.—October Term, 1968.

United States, Appellant, v. Henry Preston Covington. | On Appeal From the United States District Court for the Southern District of Ohio.

[May 19, 1969.]

Mr. Justice Harlan delivered the opinion of the Court.

This is a companion case to *Leary* v. *United States*, decided today, *ante*, at —. Appellee was charged in a one-count federal indictment in the Southern District of Ohio with having violated 26 U. S. C. § 4744 (a)(1), a part of the Marijuana Tax Act, by obtaining 737.1 grams of marijuana without having paid the transfer tax imposed by 26 U. S. C. § 4741 (a).[1] On appellee's motion, the District Court dismissed the indictment, holding that under principles established in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), appellee's privilege against self-incrimination necessarily would provide a complete defense to the prosecution. 282 F. Supp. 886 (1968).

On motion for reconsideration, the Government advanced the argument, more fully described in *Leary*, *supra*, at — – —, that the transfer tax provisions of the Marijuana Tax Act do not compel incriminatory disclosures because, as administratively construed and applied, they allow prepayment of the tax only by persons whose activities are otherwise lawful. The

[1] The relevant provisions of the Marijuana Tax Act are set out and their relationships explained in *Leary* v. *United States*, *supra*, at —.

District Court responded by ruling in the alternative that if appellee was not required to pay the tax there could be no basis for the indictment. Joint Appendix 20.

The Government appealed directly to this Court pursuant to 18 U. S. C. § 3731, which authorizes direct appeal from the dismissal of an indictment when the decision is one "sustaining a plea in bar" or "is based upon the invalidity or construction of the statute upon which the indictment or information is founded." We noted probable jurisdiction, 393 U. S. 910 (1968),[2] and the appeal was argued together with *Leary* v. *United States, supra.*

As has been noted, the District Court dismissed the indictment on two alternative grounds. We begin with the second, which was that, assuming the Government's construction of the Marijuana Tax Act to be correct, the indictment did not charge an offense under that statute. Our decision today in *Leary, supra,* makes it plain that this was an improper ground of dismissal, for we have held that the Government's interpretation is incorrect and that the Act requires persons like appellee to prepay the transfer tax. See *ante,* at ——.

The District Court's other basis for dismissal was that appellee's Fifth Amendment privilege necessarily would provide a complete defense to the prosecution. We have held today in *Leary* that the privilege does provide such a defense unless the plea is untimely, the defendant confronted no substantial risk of self-incrimination, or the

---

[2] If the dismissal rested on the ground that the Fifth Amendment privilege would be a defense, then the decision was one "sustaining a plea in bar." See *United States* v. *Murdock,* 284 U. S. 141 (1931). If the dismissal was based on a finding that under the Government's construction of the Marijuana Tax Act the indictment stated no defense, then the decision necessarily was "based upon the . . . construction of the statute upon which the indictment was founded." See *United States* v. *Borden Co.,* 308 U. S. 188, 193 (1939).

privilege has been waived. See *ante*, at ——.[3] See also *Marchetti* v. *United States*, 390 U. S. 39, 61 (1968). The questions remain whether such a plea of the privilege may ever justify dismissal of an indictment, and if so whether this is such an instance.

Federal Rule of Criminal Procedure 12 (b)(1) states that "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." A defense is thus "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.[4] Rule 12 (b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.

In many instances, a defense of self-incrimination to a Marijuana Tax Act prosecution will be "capable of determination without the trial of the general issue." A plea on motion to dismiss the indictment is plainly timely. The question whether the defendant faced a substantial risk of incrimination is usually one of law which may be resolved without reference to the circumstances of the alleged offense. There may more frequently be instances when the issue of waiver will be suitable for trial together with the "general issue."[5] However, the question whether the privilege has been waived also is one of

[3] Leary was convicted under 26 U. S. C. § 4744 (a)(2), prohibiting transportation or concealment of marijuana by one who acquired it without having paid the transfer tax, while appellee was indicted under 26 U. S. C. § 4744 (a)(1), forbidding such acquisition. We think it clear that there is no significant distinction between the statutes for purposes of the Fifth Amendment privilege.

[4] See 8 J. Moore, Federal Practice ¶ 12.04 (R. Cripes ed. 1968); 2 L. Orfield, Criminal Procedure Under the Federal Rules §§ 12.51–12.60 (1966).

[5] Cf. *Leary* v. *United States*, *ante*, at ——.

law, and in most cases there will be no factual dispute about it. Hence, we think that a defendant's assertion of the privilege should be sufficient to create a legal presumption of nonwaiver, and thus to require dismissal of the indictment, unless the Government can rebut the presumption by showing a need for further factual inquiries.

Application of these principles to this appeal requires affirmance. Appellee asserted in his motion to dismiss that his possession of marijuana was illegal under Ohio law, and that he would have run a substantial risk of incrimination had he complied with the Act. The District Court reached the same conclusion. The Government appears to acknowledge the illegality of appellee's possession.[*] We conclude that there is no possibility of any factual dispute with regard to hazard of incrimination.

There is in this brief record no indication that appellee waived his privilege, and the Government has never alleged the existence of a factual controversy on that score. Hence, we think it "just under the circumstances" that the case be finally disposed of at this level. See 28 U. S. C. § 2106; *Grosso* v. *United States*, 390 U. S. 62, 71–72 (1968); *Haynes* v. *United States*, 390 U. S. 85, 100–101 (1968). Accordingly, the judgment of the District Court is

Affirmed.

MR. CHIEF JUSTICE WARREN, considering himself bound by the decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), concurs in the judgment of the Court.

MR. JUSTICE STEWART joins the opinion and judgment of the Court upon the premise stated in his concurring opinion in *Leary* v. *United States*, *ante*, p. ——.

[*] See Brief for the United States 3, n. 1.